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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PATRICK A. SULLIVAN, Defendant and Appellant.	A130708 (San Francisco City and County Super. Ct. No. 212238)

Following an early morning altercation in the Tenderloin neighborhood of San Francisco, Patrick Sullivan stabbed William Quinn to death. He was charged with murder and it was alleged that he personally used a deadly weapon in committing the offense. (Pen. Code, §§ 187, 12022, subd. (b)(1).) Sullivan claimed self defense. A jury acquitted him of murder, but convicted him of voluntary manslaughter. Sullivan contends that the jury was not adequately instructed on his theory of complete self defense, and that the trial court erred in admitting certain hearsay statements made by the victim. We affirm.

I. BACKGROUND

On November 30, 2009, at about 1:38 a.m., Sullivan and Quinn were observed by two San Francisco police officers near the intersection of Turk and Leavenworth Streets. Sullivan was walking about five to 10 feet behind Quinn, screaming racial slurs at Quinn, who was African-American. Quinn approached one of the officers, said something about a confrontation with Sullivan, and walked quickly away up Leavenworth toward Eddy Street. When stopped by the officers, Sullivan appeared very agitated, but did not seem

frightened. Sullivan originally claimed that Quinn had a gun, but then said that he had been making things up to "get the black man in trouble." Sullivan told the officers that he had a knife and handed it to the officers. After determining Sullivan had no outstanding warrants, the officers told him to go home. Sullivan asked for his knife, a folding pocket knife, which the officers returned to him.

At about 1:50 a.m., Sullivan entered the Cadillac Market (the store) on Eddy near Hyde Street, quickly followed by Quinn. Evidence of what occurred inside the store included video recordings from surveillance cameras, an audio recording of a store clerk's calls to 911, and the testimony of the store clerk (Malik Ali), a store stocker (Jose Balam Catzen (Balam)), a store customer (Christopher Whitney), and Sullivan.

Ali testified that Sullivan entered the store and stood quietly by the left counter. He said that Sullivan looked scared.[1] When Quinn entered, Sullivan told him, "Stay away from me. I have [a] knife." Sullivan displayed a folded knife in his right hand. Quinn told Ali, "He hit me," and asked Sullivan, "Why you hit me?"[2] Ali did not see any injuries on Sullivan or Quinn or any signs that either was in pain when they entered the store. Quinn approached Sullivan. Sullivan told Ali to call 911 and again told Quinn to stay away from him. Sullivan opened his knife, stepped backward, and raised his left hand in a defensive posture. He then pushed Quinn. Quinn's hand was on Sullivan. Sullivan again told Ali to call 911, and Quinn told Ali, "Yeah, call 911. He hit me." While Quinn was speaking, Sullivan stabbed him in the chest. Quinn exited the store as Ali called 911; Sullivan remained in the store and again asked Ali to call 911. Audio recordings of Ali's 911 calls[3] were played for the jury and were consistent with Ali's

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[1] This statement was impeached with Ali's prior statements to police and with his contrary preliminary hearing testimony.

[2] Sullivan objected to these statements as inadmissible hearsay. The court overruled the objection. We discuss this evidentiary issue in greater detail *post*.

[3] After Ali ended his call to 911, the 911 dispatcher called him back for more information and that conversation was also recorded. A video recording of an interview Ali gave to the police shortly after the incident was also introduced into evidence and played for the jury.

testimony. Ali noticed Sullivan had left the store and when he went outside he saw four or five people trying to attack Sullivan while Sullivan was on the ground.

Balam[4] testified that he could not understand what anyone was saying inside the store because he did not understand English. The voices were somewhat loud. Quinn approached Sullivan and looked over at Ali. Sullivan then turned around, grabbed Quinn's shirt and stabbed him. Quinn went over toward the door and fell in pain. Sullivan then exited the store and Balam saw them both falling down in the street. Quinn was on top of Sullivan. Very quickly, police arrived and separated them.

Whitney testified that he heard the store clerk tell some people outside not to bring their "shit" into the store and then saw Quinn and Sullivan enter the store arguing. Sullivan walked all the way up to the counter and Quinn was closer to the door. Both eventually asked the clerk to call 911. Whitney was not sure whether Sullivan or Quinn was the first to ask Ali to call 911, and he could not say whether one of the men was more frightened or aggressive than the other. At some point, Quinn said Sullivan had tried to stab him outside the store. After Sullivan stabbed Quinn in the chest, Quinn stepped backward into the doorway and then stepped back into the store. He asked someone to call 911 because he had been stabbed. Whitney exited the store and looked back after he crossed the street. He saw Sullivan on top of Quinn in the street. Sullivan was hitting Quinn repeatedly with his right hand until the police arrived and "peel[ed]" Sullivan off of Quinn, i.e., physically separated the men. Whitney admitted prior convictions for receipt of stolen property and sale of methamphetamines.

Loreen, Quinn's wife,[5] testified that Quinn left home (a family shelter on Golden Gate Avenue in the Tenderloin) at about 10:00 p.m. on November 29, saying he was going out to buy a beer. Quinn had already had "a couple beers" that day and was a little tipsy when he went out. At about midnight, Loreen started calling to see where he was.

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[4] The court found that Balam was unavailable and his preliminary hearing testimony was read to the jury as part of the defense case.

[5] Loreen Quinn was also declared unavailable and her preliminary hearing testimony was read to the jury, also as part of the defense case.

On her fourth try, Quinn answered and Loreen heard "a lot of chaos, commotion in the background." She could hear Quinn arguing with another man and saying, "You took my money from me and I'll die before I let someone take my money from me." The other man, who sounded like a white man[6] said, "I'll kill you. I'm gonna stab you." Seconds later, Quinn said, "I've been stuck. He stuck me."[7] Loreen knew that Quinn had money on him that day, but when she picked up his wallet from the police it contained no money.

Loreen, who had been married to Quinn for 17 years at the time of his death, denied that he had ever been violent toward her. Her testimony was impeached with police officer testimony describing two incidents of domestic violence by Quinn.[8]

San Francisco Police Officer Patrick Dudy responded to the 911 dispatch and saw Sullivan struggling with Quinn in the street. Sullivan was on top and Quinn appeared to be trying to push Sullivan off him. Sullivan had a knife in his hand and Quinn was unarmed. Police ordered Sullivan to get off Quinn and drop the knife, and Sullivan complied. No money was found on Quinn. Sullivan did not resist arrest. He had a small amount of blood on his head, hands and clothes but no large cuts or abrasions and he did not complain of pain or need medical treatment. He had $44.96 on his person.

Quinn died as a result of the stab wound, which entered the right ventricle of the heart and the left side of the liver. The autopsy revealed five balloons containing a white

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[6] Sullivan is Caucasian.

[7] She told a defense investigator she heard a man say, "If you don't get away from me, I'll stab you," and heard Quinn respond, "That's what you got to do because I'm not gonna sit up and let you take my money like that." She told an inspector she also heard a man with an accent saying, "Leave my store."

[8] In November 2003, Loreen told police Quinn had forced his way into her apartment and threatened her by saying, "You're going to get it now," and said that she feared for her life and safety. There was no report of physical injury. In March 2006, Loreen told police that Quinn came to her home unannounced, slapped her in the face and causing her to lose consciousness, then grabbed her by both arms and dragged her outside against her will. She was crying and upset when she reported the incident but showed no sign of injury.

powdery substance in Quinn's stomach. Investigating officers did not have the contents of the balloons tested, but assumed that they contained illegal drugs. Quinn also had cocaine metabolite, Valium, codeine and methadone in his system. Quinn had past convictions for possessing crack cocaine for sale and selling methamphetamine.

Inspector Michael Gaynor interviewed Sullivan a few hours after the stabbing. A video/audio recording of the interview was introduced and played to the jury. Sullivan was calm and cooperative. Sullivan urged Gaynor to view the videotapes from surveillance cameras inside the store to see what had occurred. Sullivan also volunteered that he had been stopped by police earlier in the evening. Sullivan's statement to Gaynor was substantially consistent with his testimony at trial except where noted below.

Sullivan testified that he went to the Tenderloin to buy heroin at about 1:00 a.m. He had drunk about a pint of brandy the previous day, a Sunday, and had last used heroin on the Friday prior to the incident. He was also taking antianxiety and antiseizure medication, an antidepressant, and methadone. He went to the Wells Fargo ATM on Golden Gate between Leavenworth and Hyde, withdrew $60 at 1:17 a.m., and put the money in his pocket.[9] Within seconds of Sullivan's getting the money, Quinn approached and offered to sell him crack cocaine or heroin; Sullivan declined. Sullivan walked down Golden Gate toward Hyde and Quinn followed right behind him. Quinn tried to grab the money out of Sullivan's hands, but Sullivan was not sure if he was successful. Sullivan, closely followed by Quinn, walked north on Hyde then on Turk to Leavenworth. Sullivan testified that when they were near the intersection of Turk and Leavenworth they got into a pushing match.[10] Sullivan told Quinn several times, "Get the hell out of here. Get the fuck away from me," but Quinn never went away. When Quinn was 10 feet away from him, Sullivan saw Quinn motion as if he had a weapon:

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[9] A Wells Fargo Bank representative testified that $60 was withdrawn from Sullivan's account at 1:17 a.m. on November 30, 2009, at a Wells Fargo ATM located at 374 Golden Gate Avenue. Surveillance video for that ATM was no longer available at the time it was subpoenaed by the defense.

[10] In the police interview, Sullivan told Gaynor that there had been no physical altercation between him and Quinn before they entered the store.

Quinn pulled up his jacket and Sullivan saw a metallic object near Quinn's waist and felt scared.[11]

Sullivan got the attention of the police by yelling that Quinn was trying to rip him off. Sullivan's account of his first interaction with the police earlier that night was substantially consistent with the officers' account, except that Sullivan testified he was not yelling at Quinn or following Quinn at the time the officers first saw him.[12]

Sullivan walked north on Hyde toward Eddy and saw Quinn about 10 feet ahead walking toward him. Sullivan felt afraid and started to talk to a woman he knew on the street in an unsuccessful effort to "deflect" Quinn. After Sullivan failed to make contact with the woman, Quinn became very aggressive and threatening, saying several times, "That's my shit. Give me your shit or I'm going to take it." Sullivan thought Quinn was going to rob him and he feared for his life.

Sullivan noticed the Cadillac Market was open so he entered the store seeking safety. He pulled out his knife as he entered and asked the clerk to call 911. After Quinn entered, Sullivan turned toward him and held up the knife so Quinn could see it. He told Quinn to "stay back," but Quinn kept approaching. Sullivan then opened his knife to ward Quinn off. A few seconds later, Sullivan grabbed Quinn by the front of his sweater and his collar, pushed Quinn back to keep Quinn away from him and told Quinn he had a knife. Sullivan turned toward the clerk and again told him to call 911. He again grabbed Quinn by the collar with his left hand, pulled Quinn toward him, and stabbed Quinn in the upper left chest with his right hand. He did so because he felt it was necessary to defend his life. He stabbed Quinn only once.

After the stabbing, Quinn went to the doorway and Sullivan continued to tell him to stay away. Sullivan did not see blood on Quinn, did not see a pool of blood at Quinn's feet, and did not see Quinn fall in pain. Sullivan walked back to the counter and closed

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[11] Sullivan told Gaynor that Quinn opened his jacket and showed something up near his armpit that might have been a gun.

[12] In his interview with Gaynor, Sullivan admitted using a derogatory term toward Quinn.

his knife. Quinn appeared to be walking back into the store, so Sullivan opened his knife again because he thought Quinn still posed a threat to him. Sullivan again asked the clerk to call 911. Sullivan motioned toward the door and told Quinn to go away. After Quinn left the store doorway, Sullivan again told the clerk to call 911.

Sullivan eventually walked out of the store. Quinn saw him and "jumped on" him. They both fell into the street and rolled around, with Quinn and Sullivan on top of the other at different times. Sullivan lost possession of his knife. When the police arrived, Sullivan and Quinn were near the middle of the street. Sullivan said he did not stab Quinn a second time and was not punching Quinn. Following the struggle, Sullivan had cuts on his head as shown on photographs taken shortly after the incident.

Gaynor asked Sullivan about an old scar on the top of his head and Sullivan said a woman had attacked him. Sullivan told Gaynor about two other incidents when he had brandished his knife to protect himself and the brandishing alone stopped the situation from escalating.

The jury was instructed on the elements of murder, justifiable homicide in self defense, voluntary manslaughter under both heat of passion and imperfect self defense theories, and mitigation by voluntary intoxication.[13] In closing argument, the defense discussed voluntary manslaughter based only on a theory of imperfect self defense (not provocation or heat of passion). The jury found Sullivan not guilty of first and second degree murder, but guilty of voluntary manslaughter. The jury found true the allegation that Sullivan personally used a weapon, the knife. The court sentenced appellant to the low term of three years for the manslaughter conviction with a one-year enhancement for personal use of the knife, for an aggregate term of four years in state prison.

II. DISCUSSION

Sullivan raises two arguments on appeal. First, he contends that the court erred in refusing a proposed instruction regarding the effect of prior threats on a person's right of

[13] A toxicology test performed on Sullivan at 7:45 a.m. showed a blood alcohol concentration of 0.10 percent, 0.19 milligrams per liter of methadone, and 25 nanograms per milliliter of THC (the active agent in marijuana).

self defense. Second, he argues that the trial court erred in admitting Quinn's hearsay statements that Sullivan hit him.

A. *Failure to Instruct on Effect of Prior Threats*

In the first instance, we find that this argument is forfeited because the grounds Sullivan asserts on appeal were not raised in the trial court. In any event, we find the alleged error nonprejudicial because the court in fact told the jury it could consider prior threats by Quinn against Sullivan when assessing the reasonableness of Sullivan's belief and acts in self defense, and because the instructional language Sullivan sought would not likely have altered the outcome of the trial.

1. *Background*

On the issue of self defense, Sullivan asked the court to instruct the jury with CALCRIM No. 505 (Justifiable Homicide: Self-Defense or Defense of Another), with proposed modifications taken from a criminal defense practice publication (1 Forecite California (2006) Homicide, § F505.2 [Inst. 4], p. 5-15). CALCRIM No. 505 advises the jury that a defendant acts in lawful self-defense if he reasonably believes that he was in imminent danger of being killed or suffering great bodily injury; reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and used no more force than was reasonably necessary to defend against that danger. The instruction further tells the jury that "[w]hen deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed."

The relevant portion of the proposed defense instruction stated: "In determining whether the prosecution has proven that the defendant's conduct or beliefs were unreasonable consider all the circumstances including, but not limited to, the following: [¶] 1. Whether [the deceased, Quinn,] threatened or harmed the defendant [or others] in the past; [¶] 2. Whether the defendant knew that [Quinn] had threatened or harmed others in the past; [¶] 3. Whether the defendant received a threat from someone else that [he]

reasonably associated with [Quinn]. [¶] *Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.*" (Italics added.) The italicized language is also contained in a bracketed provision of CALCRIM No. 505, indicating that it is to be given when justified by the evidence. The trial court gave a modified version of CALCRIM No. 505, including an instruction on the effect of prior threats,[14] but declined to include the last quoted sentence (the greater self-defense measures language). Sullivan argues on appeal that this omission was prejudicial error.

The court agreed to instruct the jury that it should consider Quinn's prior threats or acts of violence toward *others* because it felt the instruction was necessary to guide the jury's consideration of character evidence that had been introduced against Quinn, specifically evidence that he had committed acts of domestic violence toward his wife. The court explained that it omitted the requested greater measures language from CALCRIM No. 505 because there was no evidence that Sullivan had been previously threatened or harmed by Quinn. When the court provided this explanation, Sullivan did not dispute the lack of evidence of prior threats against him by Quinn.

In the trial court, Sullivan argued that the greater measures language should be given not only where the defendant has been previously threatened by the *victim*, but in *any* case where the defendant has been previously threatened by anyone. He insisted that the requested language should be given in his case not because of threats by Quinn, but on the basis of evidence that Sullivan had been threatened by persons other than Quinn in the past (the two incidents when Sullivan had drawn a knife to protect himself). He also

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[14] The court's instruction was: "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. . . . [¶] . . . [¶] *If you find that William Quinn threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.* [¶] If you find that the defendant knew that William Quinn had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." (Italics added.)

cited the evidence that he had previously been physically attacked by a woman that had left a long permanent scar on Sullivan's head. The court disagreed that prior threats by persons other than the victim (and unassociated with the victim) warranted the greater measures language and observed that the phrase, "that person" in the bracketed section of CALCRIM No. 505 clearly indicates that the threat must have come from the same person the defendant allegedly killed in self defense.

As we have noted above, despite the court's reasoning, the version of CALCRIM No. 505 actually given to the jury told them to consider Quinn's threats or acts of violence against *Sullivan* as well as "others" when deciding whether Sullivan's belief in the need for self defense was reasonable. The instruction included the statement, "If you find that William Quinn threatened or harmed *the defendant* or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." (Italics added.)

2. *Analysis*

Where there is evidence that a deceased victim made threats of death or great bodily harm against the defendant, and the defendant claims those threats influenced his use of deadly force in self defense, the jury should be instructed to take the prior threats into consideration when determining if the defendant's belief and acts in self defense were reasonable. (*People v. Moore* (1954) 43 Cal.2d 517, 528.) Moreover, the jury should be instructed that a person who received such prior threats is justified in acting more quickly and taking harsher measures for his or her own protection than would a person who had not received such threats. (*Ibid.*; *People v. Garvin* (2003) 110 Cal.App.4th 484, 488 (*Garvin*); *People v. Bush* (1978) 84 Cal.App.3d 294, 303.)

On appeal, Sullivan renews his argument that the court should have included the requested greater measures language in the prior threats instruction, but he raises alternative grounds for the argument. Rather than relying on prior threats by others as he did in the trial court, he now cites threats Quinn allegedly made to him on the night of the stabbing and before they entered the store. This argument is forfeited because it was not made in the trial court. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) The cases clearly

hold that the greater measures language is a pinpoint instruction that only needs to be provided when it is requested by the defendant and there is no sua sponte duty for the trial court to provide such an instruction. (*Garvin, supra,* 110 Cal.App.4th at p. 489.)

Regarding the argument Sullivan raised in the trial court (that the greater measures language should have been given based on threats Sullivan had received from others), there is support for the argument in one justice's concurring opinion. (*People v. Gonzalez* (1992) 8 Cal.App.4th 1658, 1665–1666 (*Gonzales*) (conc. opn. of Work, J.).) However, Sullivan fails to pursue it here, and has abandoned this argument by failing to raise it on appeal. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115–1116 [appellate court may deny claim on appeal that is unsupported by legal argument applying legal principles to the particular facts of the case on appeal].)

In any event, Sullivan could not have been prejudiced by the omission of the specific language he requested. As noted *ante*, the jury *was* instructed that it should consider threats by Quinn against Sullivan when assessing whether Sullivan acted reasonably in using deadly force in self defense. The jury heard Sullivan's testimony about Quinn's threatening behavior and comments before they entered the store and we may presume that, if they found that testimony credible, they considered it when assessing the reasonableness of Sullivan's conduct. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 951 [jurors presumed to follow jury instructions].) Although the jury was not expressly instructed that Sullivan was entitled to act more quickly or take greater measures in self defense if he had previously been threatened, this concept is grounded largely in common sense. (See *Gonzales, supra,* 8 Cal.App.4th at p. 1665 (conc. opn. of Work, J.).) The jury was not instructed that prior threats are irrelevant to the reasonableness of a defendants' belief or acts in self defense. On the contrary, the jury was told to consider "all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed" and that Sullivan could act on his reasonable belief even if the belief was mistaken. (See *People v. Spencer* (1996) 51 Cal.App.4th 1208,

1220 [failure to instruct on effect of prior threats harmless because jury told to consider all circumstances and not told prior threats were irrelevant].)

There was no prejudicial error in the trial court's failure to instruct the jury with the greater measures language.

B. *Admission of Hearsay Statement by Victim*

Sullivan argues the trial court erred in admitting Quinn's hearsay statements that Sullivan hit him. We find no prejudicial error.

1. *Background*

Ali testified that when Quinn entered the store, he said, "Why you hit me?" or "He hit me." Although not noted by the parties on appeal, Whitney similarly testified he heard Quinn say Sullivan had tried to stab him outside the store.[15]

Sullivan objected to Ali's testimony as inadmissible hearsay, but the court overruled the objection based on the state of mind exception to the hearsay rule. (See Evid. Code, § 1250.)[16] As placed on the record, Sullivan's objection was that "the statement that Mr. Quinn made is untrustworthy. We see the video. We see that Mr. Quinn doesn't appear to be injured or suffering from any kind of pain. I believe it was a statement made just to act as if he is the victim, when, in fact, Patrick Sullivan is the true victim in this case." Sullivan did not request, and the court did not provide, a limiting instruction to the jury.

2. *Law*

Section 1250 provides, "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not

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[15] When Whitney first testified about Quinn's statement, defense counsel objected and the statement was stricken from the record. However, when Whitney repeated the statement on redirect examination, defense counsel did not object and confirmed this testimony on his recross examination of Whitney. Also, Gaynor testified that Whitney had told him about the statement by Quinn.

[16] Unless otherwise indicated, all further statutory references are to the Evidence Code.

made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." Section 1252 provides, "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

State of mind hearsay evidence that describes a defendant's prior conduct is not admissible to prove the defendant's prior conduct. (*People v. Armendariz* (1984) 37 Cal.3d 573, 587–588 & fn. 15 (*Armendariz*), superseded by statute on another ground as stated in *People v. Cottle* (2006) 39 Cal.4th 246, 255.) However, it is admissible to prove the declarant's state of mind or prove or explain the declarant's conduct if those facts are in issue in the case. (*Armendariz* , at pp. 586–587; *People v. Guerra* (2006) 37 Cal.4th 1067, 1114 (*Guerra*), overruled on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151.) If admitted for the limited purpose of proving the declarant's state of mind or proving or explaining the declarant's conduct, a limiting instruction should be provided to the jury. (See *Guerra*, at p. 1115.)

"The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. [Citation.] This standard is particularly appropriate when, as here, the trial court's determination of admissibility involved questions of relevance, the state-of-mind exception to the hearsay rule, and undue prejudice. [Citation.] Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Guerra, supra,* 37 Cal.4th at p. 1113.)

3. *Analysis*

Citing *People v. Deeney* (1983) 145 Cal.App.3d 647, 651–653, 657 (*Deeney*), Sullivan suggests that hearsay statements of victims concerning assaults against them by

the accused never fall within the section 1250 state-of-mind exception.[17] *Deeney* in turn cites a seminal Supreme Court decision on the state-of-mind exception to the hearsay rule. (*Deeney*, at p. 652, citing *People v. Hamilton* (1961) 55 Cal.2d 881, 895 (*Hamilton*).) *Hamilton* held that statements about prior conduct by the defendant are inadmissible under the exception because "it is impossible for the jury to separate the state of mind of the declarant from the truth of the facts contained in the declarations." (*Hamilton*, at p. 895.)

This holding in *Hamilton* is no longer good law. Another division of this court has persuasively reasoned that the enactment of the Evidence Code in 1965 and the adoption of the "Truth-in-Evidence" provision of the California Constitution in 1982 (Cal. Const., art. I, § 28, subd. (f), par. (2)) have undermined the rationale of the holding. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 387–389 (*Ortiz*).) We agree.

The People contend the statement was admissible to prove that Quinn was afraid of Sullivan or to explain his conduct just before the stabbing. In a self defense case, evidence of a victim's fear of the defendant typically is relevant because it tends to show that the victim was not likely the aggressor in the encounter. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 872; *People v. Garcia* (1986) 178 Cal.App.3d 814, 822.) Similarly, state of mind evidence to explain a victim's conduct at the time of a killing can be relevant to a self defense claim if that conduct is put in issue. (Compare *People v. Schindler* (1969) 273 Cal.App.2d 624, 638 [evidence of victim's fear relevant to dispute defendant's claim that she was aggressor] with *People v. Ruiz* (1988) 44 Cal.3d 589, 609 [conduct not in issue where victims were killed in their sleep].) In this case, it is

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[17] Sullivan argues, "Hearsay statements of victims concerning assaults against them by the accused, *when offered to prove the conduct of the accused*, are not within the exception to the hearsay rule embodied in Evidence Code section 1250." (Italics added.) By admitting the statement under section 1250, however, the trial court necessarily admitted it to prove Quinn's state of mind or prove or explain his conduct, not to prove the truth of the statement (i.e., that Sullivan in fact hit Quinn outside the store). We construe Sullivan's reliance on *Deeney, supra,* 145 Cal.App.3d 647, as an implied argument that the state of mind evidence describing prior violent or threatening conduct of the accused should always be excluded.

questionable whether Quinn's statements supported an inference that he feared Sullivan in light of Quinn's conduct of following Sullivan into the store, approaching him even though he was brandishing a knife, and not retreating.

Ultimately, we need not decide if the statements were admissible for this purpose or any other, since any error in admission of the statement was clearly harmless in light of all the evidence admitted at trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *Ortiz, supra,* 38 Cal.App.4th at p. 397, fn. 26.)[18] First, the jury heard Whitney's testimony that Quinn had said Sullivan had tried to stab him outside the store without an objection by the defense. Ali's testimony as to Quinn's statement was therefore cumulative. Second, Ali modified his testimony on recross-examination and said Quinn made the statement "He hit me" after Sullivan had pushed him inside the store, thus supporting an inference that Quinn was referring to that push in the statement and not to any physical confrontation that may have occurred before the two men entered the store. Because there was direct evidence of Sullivan's pushing Quinn inside the store, admission of hearsay evidence of that conduct was not prejudicial to Sullivan.

Third, even assuming the jury credited Ali's original testimony about the statement and found it referred to prior conduct outside the store, there is no reasonable probability the evidence affected the jury verdict. The jury apparently at least partially credited Sullivan's testimony that Quinn had been aggressive toward Sullivan before he entered the store because they convicted Sullivan of voluntary manslaughter rather than murder, indicated it had at least a reasonable doubt about whether Sullivan acted with the requisite malice. But by convicting Sullivan of voluntary manslaughter, the jury found beyond a reasonable doubt that Sullivan did not have an actual and *reasonable* belief in the need for use of deadly force in self defense. That jury had before it direct video evidence of Quinn's conduct immediately preceding the stabbing. The video recording and trial testimony showed that Quinn never assaulted Sullivan, never brandished a weapon inside the store, and may not even have touched him. According to Ali's

[18] Sullivan does not raise any claim of federal error under the confrontation clause.

testimony, Quinn was turning toward Ali and asking him to call 911 at the time he was stabbed. Even if the jury were to have credited Sullivan's testimony about Quinn's conduct before he entered the store (which referenced only vague threats and a "pushing match"), it is not reasonably likely that absent evidence of Quinn's statements, the jury would have harbored reasonable doubt about whether Sullivan's belief in the need for self defense was objectively reasonable.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.